In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1687

DAVID MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entitled to a hearing on his request to withdraw his guilty plea on the ground that the government failed to keep its part of a plea bargain.

Petitioner was indicted, along with six others, on five counts of conspiring to transport a ton of marijuana, in violation of 21 U.S.C. (1964 ed.) 176a, and 26 U.S.C. (1964 ed.) 4755(b) and 7237(a). After his arrest, petitioner offered to act as an informer for the government. On November 3, 1971, he filed a motion to dismiss the indictment against him or, in the alternative, to permit him to enter a plea of guilty to a count of the indictment which would not involve a mandatory sentence. His motion was premised on the claim that the government breached its agreement to dismiss the charges against him. He alleged that the government's promise

had been made in return for his promise to provide information that would lead to the successful prosecution of other persons involved in the sale and distribution of drugs. The government opposed this motion, claiming petitioner had failed to perform his side of the bargain. An evidentiary hearing was conducted on this issue from November 11, 1971, until November 23, 1971, when petitioner, through his retained counsel, agreed to withdraw, with prejudice, his motion to dismiss the indictment. He requested leave of court to change his plea from not guilty to guilty on Counts I and V of the indictment (Transcript of November 23, 1971, at 54).[1] After questioning petitioner as to the basis of his plea and ascertaining that he knew the maximum sentence he could receive (*id.* at 55-56), the court accepted his plea. On the day of sentencing, almost six months later, petitioner moved to withdraw his plea of guilty to Count I of the indictment. The court denied petitioner's motion, and he was sentenced to a term of imprisonment for three years. The court of appeals affirmed the conviction (Pet. App. la-lg).[2]

1. Petitioner contends that the guilty plea was defective, because the government allegedly breached its agreement with him, and that he was entitled to a hearing on this issue. But this is the very issue peti-

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[1] Count I charged petitioner with conspiring to import marijuana in violation of 21 U.S.C. (1964 ed.) 176a which specifies a mandatory sentence. Count V charged a conspiracy to transport marijuana in violation of 26 U.S.C. 4755(b), which does not contain a mandatory sentencing provision.

A copy of the November 23, 1971, volume of the transcript of the trial is being lodged with the Clerk of this Court.

[2] It remanded for resentencing to conform to the five year minimum sentence requirement of 21 U.S.C. (1964 ed.) 176a.

tioner raised in his motion to dismiss. The government denied petitioner's contentions and asserted that in fact petitioner had failed to perform his part of the agreement. An evidentiary hearing to resolve the issue was in progress when petitioner withdrew, with prejudice, his motion to dismiss the indictment; the hearing was therefore discontinued. Petitioner thus knowingly consented to the termination of the hearing to determine the issue he seeks to raise now.[3] In these circumstances, the trial court did not abuse its discretion in refusing to accept petitioner's change of plea without a further hearing.

Fontaine v. *United States* (No. 71-6757, decided April 2, 1973), cited by petitioner, is inapplicable. In *Fontaine,* it was alleged that the defendant had been coerced into entering a plea of guilty through physical abuse and illness. While this Court remanded the case to afford petitioner a hearing on his 28 U.S.C. 2255 motion, that ruling was carefully confined to the specific facts of that case. It is entirely inapplicable to the situation here, where the record shows a deliberate and knowing waiver of the very claim now adduced as a basis for setting aside the plea.

2. Petitioner additionally contends that it was error for the trial court to fail to advise him that, in pleading guilty, he was waiving his privilege against self-incrimination; he argues that this failure should render his plea invalid. This contention was properly rejected by the court of appeals, on whose opinion we rely in this regard.

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[3] Petitioner does not contend that any part of the alleged government breach of the agreement occurred after the dismissal of his motion in November 1971.

It is therefore respectfully submitted that the peti
for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08